

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JON GERALD SMITH,

Defendant-Appellant.

UNPUBLISHED

February 23, 1999

No. 205567

St. Joseph Circuit Court

LC No. 96-008455 FH

Before: Whitbeck, P.J., and Cavanagh and Griffin, JJ.

PER CURIAM.

A jury found defendant guilty of third-degree criminal sexual conduct, MCL 750.520d(1)(a); MSA 28.788(4)(1)(a). The trial court sentenced defendant as an habitual offender, MCL 769.10; MSA 28.1082, to eleven to twenty-two and one-half years' imprisonment. Defendant appeals by right and argues that his conviction and sentence should be vacated, making four claims of error. We deny all his claims and affirm.

I. Basic Facts And Procedural History

According to the prosecution theory, at the time of this offense the girl who was the victim was thirteen-years-old and entering the eighth grade. Then aged twenty-seven, defendant began an acquaintance with the victim through her relationship with his sixteen-year-old cousin, at whose house defendant was living. After initially making comments to the victim regarding her appearance, defendant soon began propositioning her for sex. Sometime after the end of the victim's relationship with his cousin, and following defendant's relocation to another residence, the two had sexual intercourse.¹

The victim and defendant jointly engaged in a pattern of deception, including development of false personas, in order to keep the truth of their relationship hidden from the victim's parents and defendant's roommates. When confronted by a roommate with knowledge of the victim's true age, defendant stated he was not concerned and had no intention of ending the relationship.² However, three or four months into the relationship the victim's mother received an anonymous phone message relating defendant's true age. Separately confronting both her daughter and defendant with this information, she was assured that the caller had simply confused defendant with an older brother.

Despite acceptance of this explanation, defendant became increasingly concerned that the victim's parents would discover the truth, and eventually the relationship ended. Noticeably depressed and upset for a number of months following its end, the victim finally confessed the truth of the relationship to her mother. Despite the victim's desire that defendant not get in trouble, a complaint was filed and defendant charged.

II. Standard Of Review

A. Request For Continuance

A trial court's ruling on a motion for a continuance is discretionary. We review such a ruling for an abuse of discretion. *In re Jackson*, 199 Mich App 22, 28; 501 NW2d 182 (1993).

B. Prosecutorial Misconduct

We review prosecutorial misconduct issues case by case to determine whether the defendant was denied a fair and impartial trial. *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996). Because defendant failed to object to the prosecutor's line of questioning or admission of the contested response, our consideration of this challenge to alleged misconduct is limited to whether failure to review would result in a miscarriage of justice. *People v Graham*, 219 Mich App 707, 711-712; 558 NW2d 2 (1996).

C. Trial Court Comments

We review a trial court's conduct for an abuse of discretion, which includes piercing "the veil of judicial impartiality." *People v Paquette*, 214 Mich App 336, 340; 543 NW2d 342 (1995).

D. Ineffective Assistance Of Counsel

We review an ineffective assistance of counsel claim to determine whether defendant has shown that counsel's performance fell below an objective standard of reasonableness and that the representation so prejudiced defendant as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). Because defendant failed to move for a *Ginther* hearing or a new trial based on ineffective assistance of counsel,³ this Court's review is limited to mistakes apparent on the record. *People v McCrady*, 213 Mich App 474, 478-479; 540 NW2d 718 (1995).

III. Statutory Provisions On Third Degree Criminal Sexual Conduct

As in force at the pertinent time, MCL 750.520d(1)(a); MSA 28.788(4)(1)(a), provided:

A person is guilty of criminal sexual conduct in the third degree if the person engages in sexual penetration with another person and if any of the following circumstances exists:

- (a) That other person is at least 13 years of age and under 16 years of age.^[4]

The “consent” of a person under the age of sixteen to engage in sexual penetration is legally ineffective and is no defense to a charge that a defendant has violated this statutory provision. *People v Worrell*, 417 Mich 617, 621-623; 340 NW2d 612 (1983).

IV. Request For Continuance

Defendant argues that the trial court erred by denying his request for a continuance. We disagree. The factors to be considered with respect to adjournments include “whether defendant (1) asserted a constitutional right, (2) had a legitimate reason for asserting the right, (3) had been negligent, and (4) had requested previous adjournments.” *People v Lawton*, 196 Mich App 341, 348; 492 NW2d 810 (1992). Defendant must also demonstrate prejudice. *Id*

On the day of jury selection, defendant's newly retained counsel filed a motion to adjourn, seeking additional time for trial preparation. Though the record demonstrates that the trial court was leaning towards denying the request, it *did not*. Rather, the trial court noted the two-week trial frame and the expectation of a two-day trial and therefore granted a recess of less than a week. In its ruling, the trial court noted that should expectations of cooperation between the parties and witnesses not come to pass, defendant could seek reconsideration. Defendant chose not to take advantage of this opportunity, yet now claims that the brief recess period was insufficient to prepare adequately.

Despite defendant’s assertion that this recess was insufficient, we find that by granting a short adjournment, and providing for the possibility of a renewed motion, the trial court did not abuse its discretion. *Jackson, supra*.

V. Prosecutorial Misconduct

Defendant contends he was denied a fair trial by the prosecutor’s deliberate elicitation of irrelevant prejudicial testimony that defendant had been in prison. Defendant claims that during the prosecutor’s direct examination of the victim he deliberately elicited the fact that defendant had been in prison. Defendant claims prejudice because the jury was never informed as to the specific nature of the conviction, when it occurred, how long defendant spent in prison or when he was released.

“The prosecutor may not inject unfounded prejudicial innuendo into the proceedings.” *People v Williams*, 114 Mich App 186, 198; 318 NW2d 671 (1982). However, the admission of a voluntary and unresponsive answer from a witness is not error. *Id.*, 198-199. The record clearly demonstrates that the victim’s answer was unresponsive and that the line of questioning was not designed to elicit this allegedly prejudicial testimony. Further, on direct examination of defendant, trial counsel elicited the fact that defendant had been previously arrested and charged with extortion. The circumstances of this offense were detailed, including that it occurred ten or eleven years prior, and that defendant “got in trouble for it.”

Defendant’s later direct testimony eliminated any substantial prejudice attributable to the contested response. Moreover, anticipated prejudice could have been easily cured by a timely instruction. Because defendant neglected to object, failure to provide further review will not result in a

miscarriage of justice. *Graham, supra*. Defendant was not denied a fair and impartial trial. *McElhaney, supra*.

VI. Trial Court Comments

Defendant next claims he was prejudiced by the trial court's improper comments before the jury. He asserts that during cross-examination of a prosecution witness the trial court improperly interjected comments and instruction directing the jurors as to what facts they were to find. Defendant acknowledges the trial court's effort to clarify these comments but claims that this "worsened" the situation.

Courts have wide, but not unlimited, discretion and power in the matter of trial conduct and a trial court's comments pierce this veil if they unduly influence the jury and thereby deprive the defendant of a fair and impartial trial. *Paquette, supra*. "When a case is tried before a jury, the judge must take care that his questions or comments do not indicate partiality." *People v Pointer*, 133 Mich App 313, 316; 349 NW2d 174 (1984). However, portions of the record should not be viewed out of context as indicating trial court bias against defendant; rather the record should be reviewed as a whole. *Paquette, supra*.

When considered in the context of the entire record, the trial court's comments do not demonstrate bias against defendant. *Paquette, supra*. Although the trial court misspoke within its initial statement, a written objection was made during the immediately ensuing recess. On notice of this error, the trial court properly clarified its statement before any further testimony was taken. The record clearly demonstrates both that the jurors understood this explanation and, most importantly, that defense counsel accepted the correction. A party cannot request a certain action of the trial court and then argue on appeal that the requested action was error. *People v McCray*, 210 Mich App 9, 14; 533 NW2d 359 (1995). Trial counsel's acquiescence effectively waives further review and, therefore, defendant was not deprived of a fair and impartial trial. *Paquette, supra*.

VII. Ineffective Assistance Of Counsel

Defendant's final claim is that he was denied effective assistance of counsel during sentencing. Defendant asserts ineffective assistance because trial counsel failed to object to the sentencing court's conclusions on defendant's prognosis for rehabilitation, and also failed to counter the state's psychological evaluation with psychiatric evidence that defendant could be rehabilitated.

To demonstrate ineffective assistance, defendant must overcome a strong presumption that counsel's assistance constituted sound trial strategy. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). He must also show that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id.*, 687-688.

Defendant claims his trial counsel neglected to seek the aid of a defense psychiatrist to assist at sentencing or to rebut the idea that he would always be a sexual predator and a threat to the community. However, during allocution, trial counsel attempted to soften the conclusions regarding defendant's

danger to the community and risk of re-offending by relating the state's evaluator's unwritten belief that despite the poor prognosis for change, treatment of persons with defendant's dysfunction can be successful.

This Court will not substitute its judgment for that of trial counsel regarding matters of trial strategy, nor will it assess trial counsel's competence with the benefit of hindsight. *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987). By merely presenting assertions that a second evaluation would rebut the state's conclusions, defendant has failed to overcome the presumption that counsel's action was sound trial strategy. *Stanaway, supra*. Additionally, without showing that a separate evaluation would have generated opposing conclusions, defendant has failed to demonstrate a reasonable probability that the result of the sentencing proceeding would have been different if defense counsel had used a defense psychiatrist. *Id.*

Defendant also asserts that trial counsel's failure to object to the trial court's conclusions regarding his future dangerousness constitutes ineffective assistance. Defendant claims that trial counsel failed to do anything to protect defendant's rights against the unfounded assumptions of both the prosecutor and trial judge.

In resolving this claim, we conclude that defendant's entire premise is flawed. Defendant's characterization of his offense as "purely consensual" is incorrect; third-degree criminal sexual conduct, MCL 750.520d; MSA 28.788(4), defines thirteen-year-old girls as lacking the capacity to consent. Moreover, the trial court's conclusion that defendant is a sexual predator presenting a danger to the community, though harsh in terminology and surely disputed by defendant, is grounded in the findings of the highly experienced presentence investigator and psychological evaluator. The foundation for this conclusion is more than adequate and we adopt it: the evidence establishes that defendant *is* a sexual predator.

Were this not the case, defendant's argument that trial counsel failed to object would nonetheless fail. Though placed on the record prior to the trial court's statement, trial counsel's allocution does rebut the trial court's conclusion. Trial counsel had her say on this issue and effectively asserted defendant's position that any improper sexual tendencies were treatable. Any objection raised during the trial court's comments would have been redundant and no doubt fruitless. Ineffectiveness of counsel cannot be predicated on the failure to make a fruitless objection. Cf. *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998) (counsel not required to argue a frivolous or meritless motion).

As he has failed to show trial counsel's performance fell below an objective standard of reasonableness, defendant has not demonstrated that trial counsel's representation deprived him a fair trial. *Pickens, supra*.

Affirmed.

/s/ William C. Whitbeck
/s/ Mark J. Cavanagh
/s/ Richard Allen Griffin

¹ In his testimony, defendant denied ever having sexual intercourse with the victim.

² According to a witness, defendant's exact words were: "Well, she's 18. She can prove it. Twat is twat. It's all pink on the inside. I'm not really worried."

³ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973). A *Ginther* hearing was held during the same proceeding as sentencing finally occurred. Its purpose was to resolve the issue, raised at the first sentencing date, whether defendant had agreed to waive preliminary examination on the promise he would not be supplemented. The court determined no such promise had been made.

⁴ The current version of the pertinent language of the statute is substantively identical, merely substituting the term "exist" for "exists."